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Class Action Lawyers Frustrated By High Court's ERISA Focus

By **Ben James**

Law360, New York (April 24, 2013, 7:44 PM ET) -- Despite its recent willingness to weigh in on the Employee Retirement Income Security Act, the U.S. Supreme Court has managed to avoid some key questions that arise in complex ERISA class actions, leaving some attorneys frustrated by an inconsistent legal landscape and hungry for guidance on issues that can make or break large-scale ERISA cases.

The nation's highest court hasn't dodged either class action issues or ERISA suits, but it seems to be looking at class actions and ERISA separately, as opposed to examining the nexus between the two, according to Thompson Hine LLP's Tim McDonald. That means the legal gray areas most pressing to class action ERISA litigators aren't getting addressed.

"It's an unintended consequence," McDonald said, pointing out that the Supreme Court had decided ERISA class cases — specifically, Conkright v. Frommert and Cigna v. Amara — in recent years. "I don't think they're ducking class action ERISA cases specifically," he said.

Last week, the Supreme Court affirmed the primacy of plan language in an ERISA subrogation case U.S. Airways brought to recover medical expenses paid on behalf of an injured employee, rejecting the Third Circuit's conclusion that courts could override clear plan terms in granting equitable relief.

That ruling came on the heels of the high court's decision to hear an ERISA case brought by a former Wal-Mart Stores Inc. employee who said she was improperly denied long-term disability benefits.

But while individual subrogation and disability benefits cases comprise a big chunk of the ERISA cases on district court dockets, they don't implicate the major fiduciary issues that arise in complex ERISA class actions, said Gregory Braden, co-chair of Morgan Lewis & Bockius LLP's ERISA litigation practice.

"Of course, there are many other major issues that we'd like to get the Supreme Court's attention on," Braden said.

Here are three issues lawyers say the Supreme Court could address to add clarity to the legal landscape surrounding big-bore ERISA litigation.

The Presumption of Prudence in Stock-Drop Cases

When a company's share value takes a nosedive and its workers lose money because their retirement funds were invested in their employer's stock, plan fiduciaries may face allegations that they should have stopped investing in or sold off that stock.

Courts apply a "presumption of prudence" — sometimes called the "Moench presumption," a reference to a 1995 Third Circuit decision — for employee stock ownership plan fiduciaries, essentially assuming that they have complied with ERISA by investing retirement assets in employer stock. But how strong that presumption is, and how it works in stock-drop cases, isn't always clear.

"A lot of circuits have agreed that there is a presumption," said Ron Richman, co-head of the employment and employee benefits group at Schulte Roth & Zabel LLP. "What they don't really agree on is what it takes to overcome that presumption."

The Sixth Circuit has a uniquely plaintiff-friendly take that's at odds with many of its sister circuits, according to Ogletree Deakins Nash Smoak & Stewart PC's Mark E. Schmidtke.

In addition to espousing a more lenient stance on what is needed to overcome the presumption, the Sixth Circuit has held that the presumption doesn't apply at the motion-to-dismiss stage, stripping away defendants' ability to get cases tossed out at the early stages of litigation.

"The standard varies, but generally, at least at the Seventh Circuit, you've got to show that the company is basically going down the drain to overcome the presumption, and in most of the circuits, that's a presumption that can be raised at the pleading stage," Schmidtke noted. "That's a huge threshold issue in these cases that can involve tens or hundreds of millions of dollars. This means there is a split in the circuits that needs to be resolved."

In its February 2012 ruling in Pfeil v. State Street, the Sixth Circuit ruled that the presumption was an evidentiary standard and not a pleading requirement, and should only be applied to a fully developed evidentiary record.

"That's a really key issue in large class actions," Richman said. "If the plaintiffs get by a motion to dismiss, that dramatically increases their ability to gain a settlement."

Vesting of Retiree Health Benefits

"Retiree health care is the No. 1 area where I cannot figure out why [the high court] won't take it," McDonald said, adding that the court had had several chances to do so. "The Sixth Circuit has a much different standard than the rest of the country, and it's almost outcome determinative in some cases."

The question of whether or not retiree health benefits are vested — in other words, guaranteed for life — often arises in cases that follow a company trimming or eliminating medical benefits for retirees.

"The Sixth Circuit seems to favor vesting and they seem to be aggressive about that, almost, in a sense, creating some type of presumption," Richman said.

Aside from the question of whether there's some presumption that benefits are vested, courts and litigants doing battle over cuts to retiree medical benefits have to deal with the question of whether the language of the relevant plan or collective bargaining agreement allows for vesting, Richman said.

"What type of language are the courts going to consider to be sufficient to vest employees?" Richman said. "It's obviously a pretty mixed question of fact and law, but there isn't a particular guideline, something that goes across all of the circuits."

The Sixth Circuit is more liberal about considering extrinsic evidence when looking at whether there was an intent that benefits be vested, while other courts will focus only on the relevant plan documents or collective bargaining agreement, according to Fisher & Phillips LLP's Jeffrey Smith.

If the high court were to tackle this issue and come down in favor of relaxed standards for vesting benefits, companies that feel they need to cut back on health care obligations to deal with tough financial circumstances will have a tough time doing so, Smith said. A Supreme Court decision going the other way would mean more flexibility.

"Employers would then be able to modify those benefits with a greater degree of certainty that their position would be upheld, and depending on how the plaintiffs see that, you may see a downtick in the number of claims filed," Smith said.

401(k) Fee Cases and ERISA's Safe Harbor

Big-name companies such as ABB Inc., Northrop Grumman Corp. and Lockheed Martin Corp. have found themselves in ERISA plaintiffs' crosshairs in recent years over allegedly excessive fees charged to 401(k) plan participants. A key issue in many of those cases is the "safe harbor" afforded to plan fiduciaries under ERISA's Section 404(c), which protects fiduciaries when plan participants exercise control over their own assets.

Exactly how that safe harbor applies — or doesn't apply — when a fiduciary gives plan participants a variety of investment options to choose from is a gray area, McDonald said.

There haven't been many circuit court rulings on that point, and the decision that have come down indicate that affording a broad array of options will go a long way toward satisfying a fiduciary's duties.

But many of these excessive 401(k) fee lawsuits are currently working their way up through appeals courts around the country, which translates to a potential for divergent rulings, McDonald noted.

"I think right now the Supreme Court is just letting that issue percolate among the circuits," he said. "That issue is probably one of the next candidates, and all of those cases are class cases."

But while there may be not be real split among the circuits, there is a rift between the courts and the U.S. Department of Labor on the safe harbor question, with the DOL leaning more toward being protective of plan participants.

"The split is more between the agency and some of the courts," said McDonald. "The DOL would like the fiduciaries to have greater responsibilities to have a limited and fully vetted set of options within the safe harbor, whereas courts are not as cramped in their construction of what might fall within that regulation."

There haven't been enough appellate decisions yet for the questions surrounding excessive fee allegations and safe harbor rules to be fully developed, but the safe harbor issue is an important one and will be fleshed out as more cases get fully litigated, Richman said.

"I think we'll see some of these issues come up, but it may take some time," Richman said.

--Editing by Elizabeth Bowen and Katherine Rautenberg.